

## Public Defenders Criminal Law Conference 2015

### Ethics – Recent Developments

#### Introduction

On 6 January 2014 a revised edition of the New South Wales Barristers' Rules (the Rules) came into effect with changes from the previous version involving the addition of eight new rules and an amendment to one existing rule. These amendments to the Rules bring them into line with the Proposed Legal Profession Conduct Rules for barristers published by the Australian Bar Association with some minor exceptions that are not relevant here. The Rules are also expected to reflect those that will take effect when the Legal Profession Uniform Law repeals and replaces the *Legal Profession Act 2004* which is anticipated to occur sometime around the middle of 2015. That is a statutory scheme that will introduce a national uniform regulatory framework for the legal profession that will apply across NSW and Victoria at this stage and provide for Barristers Legal Profession Conduct Rules which are expected to be largely the same as the current Rules.

For the purposes of this presentation I intend to first look at the implications of some of those new rules namely Rules 40A to 40C titled "Criminal Pleas" within the context of dealing with indictable offences for which a brief of evidence has been served and Rules 88(v) and 88A. The second aim of the paper is to consider the mandatory pre-trial disclosure regime in the *Criminal Procedure Act 1986* (the CPA) which commenced on 1 September 2013 and look at how the obligations placed upon legal practitioners by that legislation interact with our ethical obligations to our clients.

I note that the Rules apply throughout NSW to all legal practitioners practicing as barristers pursuant to the *Legal Profession Act 2004* (NSW). Solicitors appearing as advocates are bound by the New South Wales Professional Conduct and Practice Rules which contain rules mirroring many of the Barristers' Rules but this paper will focus on the latter and the role of counsel however the principles discussed apply equally to solicitors appearing as advocates. The Rules are not a complete code of conduct and practitioners are subject to other obligations and sanctions found in the general law (Rule 10).

#### 1. Recent Additions to the Rules

##### Criminal pleas

**40A. It is the duty of a barrister representing a person charged with a criminal offence:**

**(a) to advise the client generally about any plea to the charge; and**

**(b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.**

**40B. For the purpose of fulfilling the duty in rule 40A, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as cooperating in the criminal justice process.**

**40C. Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister;**

**(a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge;**

**(b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence;**

**(c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty; and**

**(d) may otherwise continue to represent the client.**

Rules 37 to 40 immediately preceding the new rules deal with counsel's duty to the client and Rules 37 to 39 are in general terms that do not differentiate between clients with civil and criminal matters. Rule 40 however refer specifically to criminal matters and reads:

40. A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.

As can be seen there is some overlap with Rule 40 but the new rules go much further and articulate specific ethical obligations of counsel when advising the client about his or her plea generally and particularly when faced with a strong prosecution case and finally when the client denies committing the offence charged but insists on pleading guilty.

Of course prior to the inclusion of these rules counsel were subject to ethical duties and constraints when taking instructions from the client and advising about the appropriate plea that were part of the general law and those principles continue to apply. What is required of counsel will vary according to the particular circumstances and instructions of each client and the prosecution case brought against him or her. The question of whether counsel has properly advised the client within that legal framework will usually arise when the client pleads guilty in accordance with such advice but later regrets doing so. Thus the principles of law applicable have been articulated in numerous judgments dealing with conviction appeals after pleas of guilty or decisions on applications to withdraw pleas of guilty and appeals therefrom. Some illumination upon the type of conduct required from counsel to satisfy these obligations can be gleaned from a study of the cases and some general observations can be made.

## The Law

In the High Court decision of *Maxwell v R* (1996) 184 CLR 501 Dawson and McHugh JJ said:

An accused is entitled to plead guilty to an offence with which he is charged and, if he does so, the plea will constitute an admission of all the essential elements of the offence. Of course, if the trial judge forms the view that the evidence does not support the charge or that for any other reason the charge is not supportable, he should advise the accused to withdraw his plea and plead not guilty. But he cannot compel an accused to do so and, if the accused refuses, the plea must be considered final, subject only to the discretion of the judge to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise.<sup>17</sup>

The plea of guilty must, however, be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.<sup>18</sup> But otherwise an accused may insist upon pleading guilty. That is illustrated by *R v Martin*<sup>19</sup> where the trial judge, the Chief Justice, suggested that the accused should enter a plea of not guilty. The accused declined to do so and insisted upon pleading guilty. Upon a case stated by the Chief Justice, the judgment of the court was delivered by Owen J, who said:<sup>20</sup>

It has been said that a plea of not guilty should have been entered, but it appears to me that where a man who evidently knows what he is about insists upon recording a plea of guilty, the judge cannot interfere. If there is any doubt as to the nature of the plea, or any reason to suppose that the accused is not thoroughly aware of what he is doing, a plea of not guilty should be entered; but I can see no reason why the Chief Justice should have taken that course in this instance.

The principles were most recently restated in *Khamis v R* [2014] NSWCCA 152 where Hoeben CJ at CL (McCallum & Garling JJ agreeing) stated:

[57] It was common ground that the relevant principles were set out in *Regina v Van* [2002] NSWCCA 148; 129 A Crim R 229 by Greg James J (with whom Hodgson JA and Kirby J agreed) where his Honour said:

- 48 What is necessary to be shown before an appeal might be successful from a conviction entered up as a consequence of a plea of guilty, has been variously expressed. See *Regina v Boag* (1994) 73 A Crim R 35; *Regina v Meissner* (1995) 184 CLR 132; 80 A Crim R 308; *Regina v Maxwell* (1995) 184 CLR 501; 87 A Crim R 180; *Regina v Ross* (NSWCCA, unreported 20 February 1994); *Regina v Liberti* (1991) 55 A Crim R 120 and the cases referred to by Spigelman CJ in *Regina v Hura* [2001] NSWCCA 61; 121 A Crim R 472 at 477–478 [32]–[33]. The principles have been conveniently summarised in the applicant’s submissions taken from *Hura* (above) as follows:
  - • Where the appellant “did not appreciate the nature of the charge to which the plea was entered” (*Regina v Ferrer-Esis* (1991) 55 A Crim R 231 at 233).
  - • Where the plea was not “a free and voluntary confession” (*Regina v Chiron* [\(1980\) 1 NSWLR 218](#) at 220 D-E).
  - • The “plea was not really attributable to a genuine consciousness of guilt” (*Regina v Murphy* [\[1965\] VR 187 at 191](#)).
  - • Where there was “mistake or other circumstances affecting the integrity of the plea as an admission of guilt” (*Regina v Sagiv* (1986) 22 A Crim R 73 at 80).
  - • Where the “plea was induced by threats or other impropriety when the appellant would not otherwise have pleaded guilty ... some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt” (*Regina v Concotta* (NSWCCA, 1 November 1995, unreported)).
  - • The “plea of guilty must either be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt” (*Maxwell v R* (above) at 511).
  - • If “the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt” (*Regina v Davies* (NSWCCA, 16 December 1993, unreported)). See also *Regina v Ganderton* (NSWCCA, 17 September 1998, unreported) and *Regina v Favero* [1999] NSWCCA 320.
- 49 To the cases cited should be added reference to *Regina v Iral* [1999] NSWCCA 368 in which the failure of the appellant to appreciate the nature of the charge and difficulties with an interpreter lead to the appeal being upheld; *Regina v Wilkes* [2001] NSWCCA 97; 122 A Crim R 310 where the advice of trial counsel to enter the plea was held to be imprudent and inappropriate thus occasioning a miscarriage of justice; *Regina v McLean* [2001] NSWCCA 58; 121 A Crim R 484 in which senior counsel’s inappropriate advice on the applicant’s ability to challenge a relevant matter of fact occasioned a miscarriage of injustice; *Regina v KCH* [2001] NSWCCA 273; 124 A Crim R 233 involving improper pressure by counsel and *Regina v Becheru* [2001] NSWCCA 102 and *Regina v Toro-Martinez* (2000) 114 A Crim R 533.
- 50 In *Liberti* (above) at 122, Kirby P referred to the court’s approach to a proposed change of plea or to an asserted want of understanding of what was involved in a plea of guilty as with “caution bordering on circumspection”, since such a plea in law is an admission of all the legal ingredients of the offence and is the most cogent admission of guilt that can be made: see Lee J in *Sagiv* (above). In *Meissner* (above) Brennan, Toohey and McHugh, JJ said at 141; 313:

A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in the exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if the court does act on such a plea, even if the person entering it is not indeed guilty of the offence.

[58] Howie J considered the issue in *Wong v DPP* (2005)155 A Crim R 37 at [33] where his Honour said:

- 33 A court is entitled to accept a plea of guilty that is given in the exercise of a free choice in a defendant’s own interests and there will be no miscarriage resulting from reliance on the plea even though the person entering the plea “is not in truth guilty of the offence”: *Meissner* (at 141; 313). Justice Dawson stated the following (at 157; 326–327) (footnotes omitted):

It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud.

- 36 If, on the other hand, the advice was concerned with whether he should plead guilty despite his denial of the offence in order, for example, to obtain some advantage for himself then the focus of the proceedings might be different. Simply because a defendant is induced to plead guilty because of legal advice given to him, it does not follow that he should be allowed to withdraw the plea of guilty even if others might disagree with the advice. This is because there will be no miscarriage of justice arising. The issue in such a case might focus on whether the plea of guilty was entered in the exercise of a free choice in the defendant's own interests. Of course the fact that a person is induced into taking a course of action does not mean the person in acting on that inducement is not acting from a free choice. It is not every threat, inducement or pressure applied to a defendant that either requires or justifies a court in permitting the defendant to withdraw a plea of guilty: *Sewell* (at [34]).
- 37 But if the plaintiff by taking the advice proffered to him, entered the plea of guilty as a result of the exercise of a free choice in what he believed to be his best interests at the time, and if, when he entered the plea, he understood that he was admitting his guilt of the offence to the court, it does not follow that a miscarriage of justice would arise by refusing the application simply because he maintains his innocence of the charge and has always done so, or because he now regrets taking the advice. As Dawson J stated in *Meissner* in the passage quoted above, a miscarriage of justice will normally only arise in that situation where the defendant did not understand the nature of the charge or did not intend by his plea to admit his guilt of it.

[59] What emerges from those statements of principle is that any miscarriage of justice is to be found in the circumstances in which the applicant came to enter his plea. Ordinarily, this task is not an investigation of the applicant's guilt or innocence, rather it is an examination of the integrity of the plea of guilty itself (*R v Stephen J Ray (No 2)* [2005] NSWCCA 380 at [20]; *Sabapathy v R* [2008] NSWCCA 82). The onus lies upon the applicant to demonstrate that leave should be granted.

#### **Rule 40A**

At the heart of this duty is one of the fundamental roles of defence counsel ie to provide the client with sufficient information on the law and the evidence relied upon by the prosecution to enable the client to make a fully informed decision as to whether to plead guilty or not guilty. It is an area of practice that we routinely encounter which, while often straightforward, can also give rise to ethical and practical dilemmas and difficult decisions for our clients.

By way of illustration and without purporting to set out a prescriptive advice on how to take instructions I suggest that the first step in advising the client is reading the whole of the prosecution brief and making an assessment of the evidence and the appropriateness of the charges. It is not usually worthwhile conferring with the solicitor and/or client about what plea to enter until this has been done as you will not be in a position to offer any meaningful advice on the appropriate plea or further conduct of the matter.

In conference it will usually be necessary to take the client through the same process explaining the elements of the offence and identifying what evidence could go to establishing those elements and how. If you conclude that

the charge cannot be made out on the evidence relied upon by the prosecution then you can provide the happy advice at the outset that a plea of not guilty should result in the offence being dismissed in the local court or a verdict of not guilty eventually. However that's not the end of the matter because you are duty bound to inform the client that the decision as to which plea to enter is the client's alone and that he or she is free to consider your advice and act on it or disregard it. If the client gives instructions contrary to advice it will usually be necessary to obtain as much detail as possible as to the reasons for rejecting that advice and obtain written instructions to that effect but more on that later.

Assuming the brief discloses a prime facie case that has been explained to the client then it's necessary to obtain instructions by way of response to the allegations and the case generally. It will sometimes be necessary during taking instructions to stress that while what the client says to you will be privileged it needs to be the truth ie what he or she would say on oath in the witness box if called to give evidence. Any client who starts to tell you something germane to the case with words like "Just between you and I..." or "This is not what I would say in court but..." should be stopped immediately and advised of counsel's overriding duty not to mislead the court and that you are only interested in obtaining the client's considered account of events which will be taken down as his or her instructions and used as the basis for running the defence case ie giving advice on the appropriate plea, identifying contentious and non-contentious issues, xx of prosecution witnesses, etc. Instructions should be tested against the prosecution evidence and challenged where inconsistent internally or with other seemingly credible evidence in an effort to gain the client's full version of events, flesh out any defences and to refine the areas of dispute. It may be appropriate to inform the client of the demands of mandatory pre-trial disclosure which are discussed below.

Once that process has occurred it is necessary to explain the options available to the client in choosing how to plead and this is usually best achieved by outlining the process that follows a plea of not guilty and alternatively one of guilty and touching upon the advantages and disadvantages of each. This discussion will typically involve a description of the court procedure (committal, arraignment and trial/sentence) and the taking of evidence and lead into an assessment of the strength of the prosecution case vs the prospects of an acquittal followed by some preliminary advice on the range of likely sentence if ultimately convicted after trial compared to that expected on a plea.

Counsel is duty bound to advise the client on the advantages of pleading guilty per R40 and R40A which will typically entail outlining the benefits pursuant to s 22 and, in appropriate cases, s 23 of the *Crimes (Sentencing Procedure) Act 1999* (the *Sentencing Act*). Initially this advice could be relatively brief outlining the discount for utilitarian benefit as per *R v Thomson and Houlton* (2000) 49 NSWLR 383 based on the timing of entry of the plea per *R v Borkowski* 195 A Crim R 1 and an indication of the significance of the plea to establishing mitigating features such as remorse, unlikelihood of re-offending and prospects of rehabilitation. The benefits of plea negotiations in that the prosecution may accept pleas to alternative less serious offences or less offences than that charged or on the basis of less objectively serious facts should usually be canvassed. It needs to be made clear that any plea of guilty will entail admitting to the facts that underpin the elements of the offence.

This remains the case even if the client indicates at the outset that he or she is not interested in pleading guilty and indicates an unwillingness to listen to such advice. It is counsel's obligation to advise the client of all relevant matters and not be merely responsive to the client and his or her view as to what is important. That being said counsel is duty bound to emphasise that the decision as to whether to plead not guilty or guilty is the sole responsibility of the client and one about which the client has the ultimate say.

Most practitioners will have been asked by the client on occasion "What do you think I should do? Plead guilty or not guilty?" The answer must always be, as is now mandated by R40A, that that is a decision for the client and not for the lawyer but it is a decision that the client should be make on a fully informed basis with the benefit of your advice. It may sound glib but if the prosecution case is sufficient to found a conviction the essence of the advice will usually be that if you are guilty you should plead guilty but if you are not you should plead not guilty.

### **Difficulties in obtaining instructions**

Where clients present with practical barriers to effective communication other steps may need to be taken. For clients with literacy problems or those who refuse to have a copy of their brief in prison the evidence will need to be read to them. Others who are do not speak and understand English well or at all may require the assistance of interpreters. Important evidence in the nature of video or audio evidence may need to be played to the client.

Clients with intellectual impairment may require the assistance of carers in order to properly understand your advice and be in a position to give instructions. Clients with a history of mental illness who are not suffering acute symptoms and do not present with any difficulties in comprehension or the ability to communicate instructions are able to give instructions. If the client presents as having impaired thought processes or cognitive capacity to the extent that counsel is not confident of the client's ability to understand advice and properly give instructions it would not be appropriate to proceed until that issue was resolved by medical evidence or intervention.

#### **R40B**

R40B provides some guidance to counsel on how to fulfil your obligations under R40A when it appears that the client's best interests may well be best served by entering a guilty plea because it's unlikely that he or she will escape conviction ie you can advise in strong terms. This situation may arise at any stage throughout the course of representing the client from service of the brief up to during the prosecution case at trial. In such cases your duty to promote and protect fearlessly the client's best interests requires you to communicate that conclusion to the client and explain the reasons for reaching that conclusion and raising the benefits that could still flow from pleading guilty. The question that arises is how strong can that advice be?

The High Court decision in *Meissner v R* (1995) 184 CLR 132 doesn't deal with counsel's ethical duties but Deane J offered the following helpful observations:

Thus, for example, a degree of pressure which would be quite legitimate if exerted by an accused's own lawyer acting solely in the accused's interests eg in a "plea bargaining" or "sentence indication" (footnote incorporated) situation may be completely unacceptable if exerted by a stranger acting for a collateral and selfish purpose of his or her own.

The authorities indicate that the advice can be couched in very strong terms that accurately reflect counsel's considered opinion and are directed at communicating the point as opposed to improperly influencing the decision. Ideally the advice should be the culmination of the process of giving advice and obtaining instructions referred to above. If the client prevaricates about the decision or re any necessary factual admissions underlying the plea it is necessary to go back and resolve those issues. Finally the advice must incorporate the fact that it is the client's decision ultimately and that the decision is final and that counsel remains ready to represent the client on a plea of not guilty should the client determine to proceed that way.

#### **Agreed Facts**

If the client gives instructions to plead guilty it is important to settle the factual basis of the plea with the client by obtaining clear instructions as to the facts that the client is prepared to admit to. It is necessary to ascertain from the prosecution if there can be Agreed Facts to be tendered at the sentence proceedings or an agreement as to the material to be tendered and it is usually preferable to proceed with Agreed Facts. If the factual basis of the plea cannot be agreed and it becomes apparent that there is a dispute that needs to be resolved by the sentencing judge then it is necessary to advise the client that some or all of the benefit that it is hoped will be obtained by pleading guilty could be lost. Where the client gives instructions to proceed with the guilty on the basis of Agreed Facts that contains aspects that he or she continues to deny then counsel would need to comply with R40C.

The cases also indicate a number of potential pitfalls. The advice will be imprudent if it is given too hastily and without proper deliberation and is later shown to have been inaccurate or inappropriate in that it didn't take into account all relevant factors including the client's instructions. The advice will amount to improper pressure if it includes deliberate or negligent false information which materially contributes to the client's decision.

#### **R40C**

In a paper presented to this conference in 2003 entitled *Common Ethical Problems For The Criminal Advocate* Justice Peter Hidden noted while that the Barristers' Rules provided for the situation where a client admits to counsel that he or she is guilty of the offence charged but is determined to plead not guilty they did not deal with

the converse problem where a client maintains his or her innocence but wishes to plead guilty. That situation has been remedied with the inclusion of this rule which is in accordance with pre-existing practice and legal principle. In *Meissner v R* (1995) 184 CLR 132 Brennan, Toohey & McHugh JJ stated:

A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty<sup>5</sup> when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence.

Where the client continues to deny the offence but insists on pleading guilty it is counsel's duty to ensure that this is the considered decision of the client made in the exercise of free choice in the client's best interests after being provided with the benefit of counsel's advice in all the respects referred to above.

### **Written Instructions**

The Rules do not mandate that written instructions be obtained but the authorities have reinforced the prudence of obtaining written instructions in these circumstances and most practitioners would consider it vital to do so. The written instructions not only provide a record of the process that has occurred but are useful in removing any basis for misunderstanding between counsel and the client and ensuring that the decision is the considered decision of the client. The written instructions should be read to the client and signed by him or her and any agreed facts signed as well.

The written instructions should outline the basic advice given by counsel and the instructions received from the client including an acknowledgement of the legal and factual basis of the plea. They should refer to the fact that it is the client's decision alone and that counsel has advised that the client may still defend the matters if he or she wishes to and that counsel will continue to represent the client.

### **Other Amendments to the Rules**

Other amendments to the Rules effective from 6 January 2014 are reproduced below in bold:

36. A barrister must inform the court of any **apparent** misapprehension by the court as to the effect of an order which the court is making, as soon as the barrister becomes aware of the misapprehension.

88. A prosecutor must call as part of the prosecution's case all witnesses:

- (a) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or
- (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
- (c) unless:
  - (i) the opponent consents to the prosecutor not calling a particular witness;
  - (ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;
  - (iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses;
  - (iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable; or
  - (v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.**

**88A. The prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within rule 88(c) (ii), (iii), (iv) or (v), together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if such grounds were revealed to the opponent.**

As adverted to in the Introduction these amendments bring the Rules into alignment with the ABA Model Rules which will form the basis of the Rules under the proposed Legal Profession Uniform Law. It is of concern that under rule 88(c)(v) the test ie "believes on reasonable grounds that the interests of justice would be harmed" is rather nebulous and the difficulty is compounded if the prosecutor determines under rule 88A using the same test not to inform the defence of the identity of the witness and the grounds for the decision. I am not aware of any particular case or factual scenario has given rise to the perceived need for this amendment though it could have application in matters involving issues of national security or public interest immunity.

On the issue generally of the failure by the Crown to call a relevant witness I note the decision of *Gilham v R* [2012] NSWCCA 131 where the court stated:

383. The primary obligation imposed on a Crown Prosecutor in discharge of the function which it is the prosecutor's to perform in a criminal trial finds expression in the Director's Guidelines and the rules of professional practice enshrined in the New South Wales Barristers' Rules, as well as the principles relating to the calling or non-calling of witnesses in the collected authorities. That obligation is to act fairly by ensuring that the Crown case is presented with fairness to the accused.

384. While it is the Crown Prosecutor alone who bears the responsibility for deciding whether a person will be called as a witness for the Crown, that decision must be made consistently with the overriding obligation to act fairly and in strict accordance with what was then Rule 62 of the Barristers' Rules. This rule was binding on Crown Prosecutors as legal practitioners (as the identical Rule 82 is currently) by virtue of [s 711](#) of the [Legal Profession Act 2004](#). That rule provided:

"A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have *the whole of the relevant evidence* placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts." (Emphasis added)

385. [Section 13](#) of the [Director of Public Prosecutions Act 1986](#) empowers the Director to furnish guidelines to Crown Prosecutors, which guidelines bind them in the prosecution of offences. The Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales, issued in June 2007 and in force at the time of both trials, provide as follows:

"The prosecution should generally call all apparently credible witnesses whose evidence is admissible and essential to the complete unfolding of the prosecution case or is otherwise material to the proceedings. Unchallenged evidence that is merely repetitious should not be called unless that witness is requested by the accused.

If a decision is made not to call evidence from a material witness where there are *identifiable circumstances clearly establishing that his or her evidence is unreliable*, the prosecution, where the accused requests that the witness be called and where appropriate, should assist the accused to call such a witness by making him or her available or, in some cases, call the witness for the purpose of making him or her available for cross-examination without adducing relevant evidence in chief (see Rule A.66B of the [Barristers'] Rules - Appendix B)."

The Court went on to refer to Bar Rules then in force and quote from the Directors Guidelines before continuing:

388. A decision by a prosecutor not to call a particular witness will constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it could be seen to give rise to a miscarriage of justice (see *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563 at 575). As the High Court made clear in *Apostilides*, reference to misconduct was omitted in this connection to broaden the approach to the question of miscarriage so as to focus on the consequences, objectively perceived, that the failure to call a witness has had on the course of the trial and its outcome. The Court went on to say at [577]:

"...It is not necessary to postulate misconduct of the prosecutor as an essential condition precedent to a miscarriage of justice. No doubt in the great majority of cases of this kind an appellate tribunal which finds a



miscarriage of justice to have occurred will trace that miscarriage to a wrong exercise of judgment by the prosecutor which led to the witness not being called. In cases where there has been no error of judgment there will be less likelihood of a miscarriage resulting from the failure to call the witness..."

389. In *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657 Deane J said at 663:

"Under the adversary system which operates in a criminal trial in this country, it is for the Crown and not the judge to determine what witnesses are called by the Crown. That is not to say that the Crown is entitled to adopt the approach that it will call only those witnesses whose evidence will assist in obtaining a conviction. Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one..."

The observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. Whether or not their names appear on the back of the indictment or information, all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reason exists for refraining from calling a particular witness or witnesses, such as that the interests of justice would be prejudiced rather than served by the calling of an unduly large number of witnesses to establish a particular point..."

Finally the Court noted at paragraph 404:

The Crown Prosecutor's obligation is to call all relevant evidence at his or her disposal. That obligation is a continuing obligation which persists until the Crown case is closed. The *Apostilides* principles are not the rules of a game. They are rules designed as a protection against unfairness or the abuse of prosecutorial power (see *R v Gibson* [2002] NSWCCA 401 (Sully J at [49], Wood CJ and Howie J agreeing)), quoting *Randall v R* [2002] 1 WLR 2237 at 2243."

The remaining rules added and commencing on 6 January 2014 appear at the end of the previous version under the heading "Confidentiality & Conflicts" and are reproduced below for the sake of completeness:

115. A barrister shall not give an undertaking to the court on behalf of a solicitor or a client without express authority of the person concerned.

116. A barrister shall not disclose to the court, whether in submissions, examination, cross-examination or otherwise, any communication between the barrister and legal representatives appearing in the proceedings for any other party to the proceedings:

- (a) except by consent;
- (b) unless what occurred resulted in the creation of some contractual or other legal relationship; or
- (c) unless it was expressly stated before or at the commencement of such communication that matters communicated should not be regarded as without prejudice or privileged from use or disclosure; or
- (d) unless disclosure is required by the Court.

## **ANTI-DISCRIMINATION AND HARASSMENT**

117. A barrister must not in the course of practice, engage in **conduct which** constitutes:

- (a) discrimination;
- (b) sexual harassment; or
- (c) workplace bullying.

## **2. Mandatory Defence Disclosure**

The *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* came into effect (with the cognate *Evidence Amendment (Evidence of Silence) Act 2013*) on 1 September 2013 creating the current mandatory pre-trial disclosure regime in the *Criminal Procedure Act 1986 (CPA)* at Chapter 3, Part 3 (Trial Procedures), Division 3 (Case management provisions and other provisions to reduce delays in proceedings). The provisions provide for mandatory pre-trial disclosure by the prosecution and the defence and for steps that can be taken by the parties and the court in the trial as a result of things disclosed or not disclosed by the parties as required. In the second reading speech introducing the Bills on 13 March 2013 the then Attorney General described the intended effect of the Act as follows:-

“The purpose of the Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill is to reform the case management provisions in part 3, division 3 of the Criminal Procedure Act 1986. It expands the scope of mandatory disclosure requirements in criminal trials and allows an unfavourable inference to be drawn by a jury against a defendant who fails to comply with a pre-trial disclosure requirement under the division.”

“The primary purpose of the new case management regime is to narrow the contested issues at trial. This will lead to shorter trials and will prevent inconvenience to those witnesses whose evidence can be agreed beforehand. Importantly, however, the provisions will also provide a consequence for accused persons who frustrate the criminal justice process by not engaging with the court and the prosecution in identifying the issues in dispute before their trial.”

The relevant provisions of the CPA are:

#### **141 Mandatory pre-trial disclosure**

- (1) After the [indictment](#) is presented or filed in proceedings, the following pre-trial disclosure is required:
    - (a) the [prosecutor](#) is to give notice of the prosecution case to the [accused person](#) in accordance with section 142,
    - (b) the [accused person](#) is to give notice of the defence response to the prosecution’s notice in accordance with section 143,
    - (c) the prosecution is to give notice of the prosecution response to the defence response in accordance with section 144.
  - (2) Pre-trial disclosure required by this section is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the [court](#).
- Note** : Practice notes issued by the [court](#) will guide determinations of the timetable for pre-trial disclosures and related matters.
- (3) The [court](#) may vary any such timetable if it considers that it would be in the interests of the administration of justice to do so.
  - (4) The [regulations](#) may make provision for or with respect to the timetable for pre-trial disclosure.

Both the Supreme Court (SC) and the District Court (DC) have issued practice notes pursuant to s 141(2) of the CPA which practitioners need to be fully acquainted with. The SC has re-issued Practice Note SC CL 2 - Criminal Proceedings on 29 September 2014 while the DC has Practice Note 9 issued on 19 August 2013. The DC Practice Note is confined to setting out the timetable for service referred to in s 141(1)(a), (b) and (c). The SC Practice Note is broader in scope dealing with case management from arraignment and has the stated purpose of ensuring that proceedings are dealt with in a timely and efficient way consistent with the obligations under Chapter 3, Part 3 of the CPA and to assist an accused to take advantage of legislation which provides for a discount in sentence when an early plea of guilty is entered. It also stipulates in cl 10(a) that the notice of prosecution case include a statement as to the basis upon which the prosecution will contend that the accused is criminally responsible in respect to the alleged offence.

The requirements for the prosecution’s notice are set out in s 142 of the CPA and reflect the pre-existing obligation on the prosecution to make full disclosure to the accused of all relevant material in a timely manner and on a continuing basis. It reads:

#### **142 Prosecution’s notice**

- (1) For the purposes of section 141 (1) (a), the prosecution's notice is to contain the following:
- (a) a copy of the [indictment](#),
  - (b) a statement of facts,
  - (c) a copy of a statement of each witness whose evidence the [prosecutor](#) proposes to adduce at the trial,
  - (d) a copy of each document, evidence of the contents of which the [prosecutor](#) proposes to adduce at the trial,
  - (e) if the [prosecutor](#) proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,
  - (f) a copy of any exhibit that the [prosecutor](#) proposes to adduce at the trial,
  - (g) a copy of any chart or explanatory material that the [prosecutor](#) proposes to adduce at the trial,
  - (h) if any expert witness is proposed to be called at the trial by the [prosecutor](#), a copy of each report by the witness that is relevant to the case,
  - (i) a copy of any information, document or other thing provided by [law enforcement officers](#) to the [prosecutor](#), or otherwise in the possession of the [prosecutor](#), that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the [accused person](#),
  - (j) a list identifying:
    - (i) any information, document or other thing of which the [prosecutor](#) is aware and that would reasonably be regarded as being of relevance to the case but that is not in the [prosecutor's](#) possession and is not in the [accused person's](#) possession, and
    - (ii) the place at which the [prosecutor](#) believes the information, document or other thing is situated,
  - (k) a copy of any information in the possession of the [prosecutor](#) that is relevant to the reliability or credibility of a prosecution witness,
  - (l) a copy of any information, document or other thing in the possession of the [prosecutor](#) that would reasonably be regarded as adverse to the credit or credibility of the [accused person](#),
  - (m) a list identifying the statements of those witnesses who are proposed to be called at the trial by the [prosecutor](#).
- (2) The [regulations](#) may make provision for or with respect to the form and content of a statement of facts for the purposes of this section.
- (3) In this section,  
**"law enforcement officer"** means a police officer, or an officer of one of the following agencies:
- (a) the Police Integrity Commission,
  - (b) the New South Wales Crime Commission,
  - (c) the Independent Commission Against Corruption.

In my experience the prosecution notice will attach for ss (1)(b) a Crown Case Statement. Re ss (1)(c) it appears to be standard practice to refer to an attachment that is an index of all the statements (and other evidence) in the prosecution brief previously served on the defence in the proceedings ie all the possible witnesses who provided statements to police and not a witness list of the witnesses "whose evidence the [prosecutor](#) proposes to adduce at the trial". This can create issues for the defence in complying with requirements of s143(e)(i) which is discussed below in that it cannot sensibly consider consenting to the statements of witnesses until it know what witnesses the prosecution actually proposes to call.

The requirements to be met by the defence are set out in s 143 which reads:

### 143 Defence response

- (1) For the purposes of section 141 (1) (b), the notice of the defence response is to contain the following:
- (a) the name of any Australian legal practitioner proposed to appear on behalf of the [accused person](#) at the trial,
  - (b) the nature of the [accused person's](#) defence, including particular defences to be relied on,
  - (c) the facts, matters or circumstances on which the prosecution intends to rely to prove guilt (as indicated in the prosecution's notice under section 142) and with which the [accused person](#) intends to take issue,
  - (d) points of law which the [accused person](#) intends to raise,
  - (e) notice of any consent that the [accused person](#) proposes to give at the trial under section 190 of the [Evidence Act 1995](#) in relation to each of the following:
    - (i) a statement of a witness that the [prosecutor](#) proposes to adduce at the trial,
    - (ii) a summary of evidence that the [prosecutor](#) proposes to adduce at the trial,
  - (f) a statement as to whether or not the [accused person](#) intends to give any notice under section 150 (Notice of alibi) or, if the [accused person](#) has already given such a notice, a statement that the notice has been given,
  - (g) a statement as to whether or not the [accused person](#) intends to give any notice under section 151 (Notice of intention to adduce evidence of substantial mental impairment).
- (2) The notice of the defence response is also to contain such of the following matters (if any) as the [court](#) orders:
- (a) a copy of any report, relevant to the trial, that has been prepared by a person whom the [accused person](#) intends to call as an expert witness at the trial,

- (b) if the [prosecutor](#) disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the [accused person](#) proposes to require the [prosecutor](#) to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
- (c) notice as to whether the [accused person](#) proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the [prosecutor](#),
- (d) if the [prosecutor](#) disclosed an intention to tender at the trial any transcript, notice as to whether the [accused person](#) accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
- (e) notice as to whether the [accused person](#) proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the [prosecutor](#),
- (f) notice of any significant issue the [accused person](#) proposes to raise regarding the form of the [indictment](#), severability of the charges or separate trials for the charges,
- (g) notice of any consent the [accused person](#) proposes to give under section 184 of the [Evidence Act 1995](#).

Re ss (1)(b) it seems sufficient to describe the nature of the defence as concisely as possible.

Re ss (1)(c) what is required here needs to be determined on a case by case basis with regard to the nature of the defence referred to in ss (1)(c) and with s 145(2) referred to below in mind.

Re ss (1)(e)(i) the defence is required to give notice of any proposed consent under s 190 of the *Evidence Act 1995* to a statement of a witness that the [prosecutor](#) proposes to adduce at the trial. This creates the difficulty for the defence that unless the prosecution notice contains a proposed witness list as opposed to an index to the prosecution brief it is not possible to sensibly respond.

Re ss (1)(f) requires a statement as to whether the accused intends to or has already given notice of alibi under s 150 of the *CPA*

Re ss (1)(g) requires a statement as to whether the accused intends to give notice under s 151 of the *CPA* Notice of intention to adduce evidence of substantial mental impairment.

Clearly the matters referred to in ss (2) are not mandatory and need only be included in the defence response if the court orders and only to the extent that the court orders.

#### **145 Dispensing with formal proof**

- (1) If a fact, matter or circumstance was alleged in a notice required to be given to the [accused person](#) by the [prosecutor](#) in accordance with this Division and the [accused person](#) was required to give a defence response under section 143 but did not disclose in the response an intention to dispute or require proof of the fact, matter or circumstance, the [court](#) may order that:
  - (a) a document asserting the alleged fact, matter or circumstance may be admitted at the trial as evidence of the fact, matter or circumstance, and
  - (b) evidence may not, without the leave of the [court](#), be adduced to contradict or qualify the alleged fact, matter or circumstance.
- (2) If evidence was disclosed by the prosecution to the [accused person](#) in accordance with this Division and the [accused person](#) was required to give a defence response under section 143 but did not include notice in that response under section 143 (1) (c) in relation to that evidence, the [court](#) may, by order, dispense with the application of any one or more of the following provisions of the [Evidence Act 1995](#) in relation to the adducing of the evidence at trial:
  - (a) Division 3, 4 or 5 of Part 2.1,
  - (b) Part 2.2 or 2.3,
  - (c) Parts 3.2-3.8.
- (3) The [court](#) may, on the application of a party, direct that the party may adduce evidence of 2 or more witnesses in the form of a summary if the [court](#) is satisfied that:
  - (a) the summary is not misleading or confusing, and
  - (b) admission of the summary instead of evidence from the witnesses will not result in unfair prejudice to any party to the proceedings.
- (4) The [court](#) may, in a direction under subsection (3), require that one or more of the witnesses whose evidence is to be adduced in the form of a summary are to be available for cross-examination.
- (5) The opinion rule (within the meaning of the [Evidence Act 1995](#)) does not apply to evidence adduced in accordance with a direction under subsection (3).
- (6) The provisions of this section are in addition to the provisions of the [Evidence Act 1995](#), in particular, section 190.

In the second reading speech of 13 March 2013 the AG said of this provision:

“Item [7] of schedule 1 amends subsection (2) of section 145 so that it now refers to the new mandatory defence requirement to set out the prosecution facts, matters or circumstances with which the accused takes issue. This is instead of the current discretionary requirement to give notice as to whether the accused proposes to dispute the admissibility of any evidence, as that requirement will now be captured by the requirement in the bill to set out the prosecution facts, matters or circumstances with which the accused takes issue. If the accused fails to identify any issue with prosecution evidence of a fact, matter or circumstance, then the prosecution may be permitted by the court to dispense with formal proof in accordance with subsections (1) and (2) of section 145. For example, the prosecution may be allowed to ask leading questions of a prosecution witness where the accused has failed to take issue with that evidence in the defence response, or the prosecution may be allowed to adduce evidence impugning the credibility of a defence witness, which would otherwise be excluded by the Evidence Act, where the accused has failed to take issue with that evidence.”

#### **146 Sanctions for non-compliance with pre-trial disclosure requirements**

(1) Exclusion of evidence not disclosed

The [court](#) may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(2) Exclusion of expert evidence where report not provided

The [court](#) may refuse to admit evidence from an expert witness in proceedings that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(3) Adjournment

The [court](#) may grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with requirements for pre-trial disclosure imposed by or under this Division and that would prejudice the case of the party seeking the adjournment.

(4) Application of sanctions

Without limiting the [regulations](#) that may be made under subsection (5), the powers of the [court](#) may not be [exercised](#) under this section to prevent an [accused person](#) adducing evidence unless the [prosecutor](#) has complied with the requirements for pre-trial disclosure imposed on the prosecution by or under this Division.

(5) Regulations

The [regulations](#) may make provision for or with respect to the [exercise](#) of the powers of a [court](#) under this section (including the circumstances in which the powers may not be [exercised](#)).

The only reported judgment dealing with this provision that I am aware of is a decision of Hulme J in *R v Hawi & Ors* (No 10) [2011] NSWSC 1656 dealing with an objection under s 146 within the previous non-mandatory case management scheme under the *CPA* where the court had made orders for the parties to comply with s 141, 142, 143 and 144. The defence objected to the Crown calling a witness on the basis that a statement of that witness had not been disclosed by the prosecution as required by s 142 of the *CPA*. Evidence taken on the voir dire established that the statement had not been disclosed by the police to the prosecution due to an inadvertent oversight on the part of a junior police officer which was in breach of the statutory obligation on police to disclose to the DPP pursuant to s 15A(1) of the *Director of Public Prosecutions Act 1986*. The terms of the then s 142 referred, inter alia, to s 137(1)(c) which was in the same terms as the current s 142(1)(c) and required the prosecution's notice to contain “a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial”. Hulme J overruled the objection on two grounds ie firstly because that the disclosure obligation was on the “prosecutor” as defined by s 3 of the *CPA* and that definition did not extend to the police and the prosecutor had disclosed the statement as soon as it became aware of it. Secondly his Honour found that the defence disclosure had failed to comply with the requirement pursuant to s 143(1)(c) to disclose whether the accused took issue with the Crown's contentions that he was part of the affray that the witness could give evidence of and was not embarrassed by the Crown's late disclosure and was himself open to sanction under s 146(1).

#### **146A Drawing of inferences in certain circumstances**

- (1) This section applies if:
  - (a) the [accused person](#) fails to comply with the requirements for pre-trial disclosure imposed by or under this Division on the [accused person](#), or
  - (b) the [accused person](#) is required to give a notice under section 150 (Notice of alibi) and fails to do so.
- (2) If this section applies:
  - (a) the [court](#), or any other party with the leave of the [court](#), may make such comment at the trial as appears proper, and
  - (b) the [court](#) or jury may then draw such unfavourable inferences as appear proper.
- (3) A person must not be found guilty of an [offence](#) solely on an inference drawn under this section.
- (4) Subsection (2) does not apply unless the [prosecutor](#) has complied with the requirements for pre-trial disclosure imposed by or under this Division on the prosecution.
- (5) This section does not limit the operation of section 146.

In the second reading speech on 13 March 2013 the Attorney General referred to this section in the following way:

“If the new section 146A applies, then two steps are set out under proposed subsection (2). First, the court, or any other party with the leave of the court, may make such comment at the trial as appears proper. “Any other party” is likely to mean prosecution counsel, who may wish to bring the accused’s failure to raise relevant matters in their response to the prosecution case to the attention of the jury during his or her closing. It could also refer to counsel for a co-accused. The party seeking to make comment will not be allowed to invite the jury to draw an unfavourable inference. They are only permitted to highlight the failures of the accused, and will need to seek the judge’s permission in the absence of the jury before doing so. Only the trial judge will be permitted to comment to the jury about the availability of the unfavourable inference. It is intended that the Judicial Commission’s Bench Book Committee will prepare material for judges giving guidance on how to make such comment to the jury. Secondly, once comment has been made, the court—if it is sitting as a judge-alone trial without a jury—or the jury may then draw such unfavourable inferences as appear proper. In considering what inferences appear proper, the court or the jury will take into account the circumstances of the particular case in which they are being asked to give a verdict. New subsection (3) of the new section 146A states that an accused cannot be found guilty solely on an inference drawn under the section. This is an important safeguard for accused persons, as it ensures that there must be other evidence of the accused’s guilt, besides the unfavourable inference, before the jury can be satisfied beyond a reasonable doubt and return a guilty verdict.”

Whilst the extent to which this provision could impact detrimentally to an accused is yet to be determined by any appellate court that I am aware of it is clearly an important consideration to be considered when complying with the disclosure requirements in s 143.

I note generally in relation to compliance with the spirit of pre-trial disclosure that s 22A of the Sentencing Act may have some relevance on sentence should the client be convicted.

### **S 22A Crimes (Sentencing Procedure) Act 1999**

If the client determines to plead not guilty and go to trial R40 may also oblige counsel to advise the client in an appropriate case that if he or she “authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings” then, if ultimately found guilty, the court may impose a lesser penalty than that which would otherwise have been imposed pursuant to s 22A of the *Sentencing Act*. Since this section receives far less judicial attention than s 22 and s 23 I include, as an example of its operation, the following excerpt from the judgment on sentence in *R v Whitby* [2010] NSWDC 214 where Judge Berman SC noted:

111 One particular issue raised on sentence concerned the way in which the trial was conducted. The offender did not deny that all offences, apart from count one, could be seen on the various DVD recordings, with the issue for me to determine limited to the identity of the person seen doing those acts. This had a significant utilitarian benefit to the criminal justice system, obviating the need for the Crown to show me the entire contents of all the DVDs. Instead only excerpts were shown in court with the offender not challenging the accuracy of synopses of the DVDs prepared by the police.

112 Further, cross examination of LW1 on the count which was not based on a video recording (count 1) was limited to an enquiry concerning the frequency of abuse and the identity of the abuser. In other words, she was not cross examined to suggest that she was lying. Other decisions made by the offender concerning the conduct of his trial were of assistance, including admissions as to the identity of the children.

113 Despite this attitude the Crown case on sentence is that this utilitarian benefit should not result in any lower sentence. The Crown points to the strength of the Crown case in this regard.

114 I do not accept the Crown's submission. Just as it is an error for a judge to reduce the discount for a plea of guilty because of the strength of the Crown case, so it is similarly an error for a judge to refuse to properly take into account the utilitarian benefit which flows from the way in which an offender has conducted a trial because of the strength of the case against him.

115 If a person gets a discount of between 10% and 25% for pleading guilty, which obviates the need for a trial at all, then clearly the discount for assistance in the conduct of a trial must, necessarily, be modest.

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Public Defenders Chambers

22 February 2015